No. 90-472

In The Supreme Court of the United States

October Term, 1990

NATIONAL FABRICATORS, INC.
Petitioner

versus

NATIONAL LABOR RELATIONS BOARD
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MURPHY J. FOSTER, III, T.A.

BREAZEALE, SACHSE & WILSON
23rd Floor, One American Place
Post Office Box 3197
Baton Rouge, Louisiana 70821-3197
Telephone: (504) 387-4000

Counsel for Petitioner,
National Fabricators, Inc.

Franklin Press, Inc. • Baton Rouge, Louisiana

QUESTIONS PRESENTED

1. Whether a United States Court of Appeals may properly conclude that an employer's conduct was "inherently destructive" although the adverse effect of the conduct on employee's rights was "comparatively slight" and neither the National Labor Relations Board nor the Administrative Law Judge found that the conduct created direct and unambiguous obstacles to the future exercise of employee rights.

2. Whether the legal presumptions associated with a finding of "inherently destructive" conduct must be reserved to those situations where overwhelming evidence leads to no other reasonable conclusion.

PARTIES

PETITIONER

National Fabricators, Inc.[1]
Murphy J. Foster, III
One American Place, Twenty-Third Floor
P.O. Box 3197
Baton Rouge, LA 70821-3197

RESPONDENT

National Labor Relations Board
Jerry M. Hunter
General Counsel
National Labor Relations Board
1717 Pennsylvania Ave. N.W.
Washington, D.C. 20570

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[1] Pursuant to Supreme Court Rule 28.1, a list naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of National Fabricators, Inc. has been included in the original brief on behalf of appellant, National Fabricators, Inc. filed with the United States Court of Appeals for the Fifth Circuit at page i.

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No._____

IN THE

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NATIONAL FABRICATORS, INC.

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays for a writ of certiorari to review the judgment of the United States Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the United States Fifth Circuit Court of Appeals is reported at 903 F.2d 396 and is reproduced in Appendix A. The opinion of the National Labor Relations Board is reproduced in Appendix B. The opinion of the Administrative Law Judge is reproduced in Appendix C.

JURISDICTION

Jurisdiction was vested in the United States Fifth Circuit Court of Appeals pursuant to 29 U.S.C. § 160(f). The judgment of the United States Fifth Circuit Court of Appeals was entered on June 19, 1990. The jurisdiction of this Court to review said decision is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The case originated with an unfair labor practice charge filed by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO Local 198 (hereinafter the "Union") against National Fabricators, Inc. (hereinafter "National Fabricators"). The charge alleged that National Fabricators' supervisors (Union members themselves) had violated the National Labor Relations Act, 29 U.S.C. § 151 et seq. (hereinafter the "Act") by temporarily laying off seven employees (also Union members).

This charge was tried before Administrative Law Judge J. Pargen Robertson (hereinafter the "ALJ") on July 13, 1988. Although the ALJ resolved all credibility issues in favor of National Fabricators and found that the temporary lay-offs were not motivated by anti-union sentiment, the ALJ nevertheless held the unfair labor practice charge had merit. National Fabricators appealed to the National Labor Relations Board (hereinafter the "Board") which also found a violation of the Act without discussing the fact that no anti-union animus had been found. National Fabricators appealed this decision to the United States Fifth Circuit Court of Appeals, which rendered its decision on June 19, 1990. The Court of Appeals enforced the Board's Order and concluded *for the first*

time in these proceedings that the alleged acts of National Fabricators constituted "inherently destructive conduct," and, therefore, anti-union animus would be presumed.

National Fabricators is a non-union pipe fabrication shop and has employed union and non-union members for many years. National Fabricators has no contract or bargaining agreement with the Union. The underlying dispute of this case began when the Union sent a letter dated September 15, 1987 to its Baton Rouge membership, directing the members to stop working for non-union shops by October 15, 1987 or suffer union penalties. The September 15th letter caused great disruption among the workers, considering that they had relied on a letter from the Union dated December 15, 1986 approving their employment with non-union shops.

During late September and early October of 1987, National Fabricators experienced a periodic work slow-down. As a result, National Fabricators determined that a temporary layoff was necessary. The only question remaining was which employees would be temporarily laid off. This decision was made by Oscar LaFleur, the production shop supervisor and card-carrying Union member, along with Lewis Reid Jury, a National Fabricators foreman and also union member.

Each of the seven employees chosen for temporary layoff expressed their intention to Mr. LaFleur that in response to the Union's letter of September 15th, they would be forced to quit their jobs with National Fabricators by October 15, 1987. Rather than lay off other employees, National Fabricators selected those men who already expressed their intent to quit their jobs. All seven employees in question were rehired within three weeks. No strike or other concerted activity ever materialized. No other complaint or unfair labor practice charge has been filed against National Fabricators in connection with this situation.

REASONS FOR GRANTING THE WRIT

1. THE CONDUCT COMPLAINED OF IS NOT "INHERENTLY DESTRUCTIVE"

The fundamental issue in this case is whether a temporary lay-off of union employees can be classified as "inherently destructive conduct" when the employer not only retained other union members during the lay-off period, but recalled the laid-off workers within three weeks and subsequently hired additional union employees. If the conduct complained of does not rise to the level of "inherently destructive," then National Fabricators is entitled to judgment in its favor because the finder of fact concluded that no anti-union animus existed.

The Court of Appeals below was the first and only tribunal to reach the conclusion that the conduct complained of was "inherently destructive." The court relied on the following statement from the Board:

> "[s]uch direct coercion of employees to abandon contemplated support for union activity would surely pose a lingering hinderance to future organizational activity."

National Fabricators, Inc. v. National Labor Relations Board, 903 F.2d 396, 399 (5th Cir. 1990).

This conclusion by the Board is insufficient to invoke the harsh presumptions of law associated with the finding of "inherently destructive conduct." This term is not easily defined and cases finding a violation under this standard are rare. *Loomis Courier Service, Inc. v. National Labor Relations Board*, 595 F.2d 491, 495 (9th Cir. 1979). In *National Labor Relations Board v. Great Dane Trailers*, 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967), the Court established two categories of unfair labor practices. If the employer's discriminatory conduct was "inherently

destructive" of important employee rights, no proof of anti-union motivation is needed. However, if the *adverse effect* of the discriminatory conduct is "comparatively slight," anti-union motivation must be proven to sustain the charge when the employer comes forward with evidence of a legitimate business reason for the conduct. These two categories encompass the entire universe of employer actions that have any "nontrivial" adverse effect on employee rights. *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, Local 88 v. National Labor Relations Board*, 858 F.2d 756 (D.C. Cir. 1988).

What is inherently destructive conduct? In *Esmark, Inc. v. National Labor Relations Board*, 887 F.2d 739 (7th Cir. 1989), the court stated as follows:

> "The Supreme Court has not provided a precise definition of 'inherently destructive' conduct. However, it is clear that the label 'inherently destructive' may be applied only to conduct which exhibits hostility to the *process* of collective bargaining itself; actions which merely further an employer's *substantive* bargaining position in a particular contract negotiation are not 'inherently destructive' as long as the employer respects the employees' right to engage in concerted activity. Inherently destructive conduct is that conduct which has 'far reaching effects which would hinder future bargaining'; i.e., that conduct which 'creat[es] visible and continuing obstacles to the future exercise of employee rights.' However, where an employer's conduct is of temporary duration, and seeks to put pressure on union members to accept a particular management proposal, but does not attempt to prevent the employees from bargaining collectively, it is not unlawful without proof of antiunion motivation."

Esmark, Inc., 887 F.2d at 748.

In the present case, because the Union has *never attempted* to establish itself as the bargaining agent for the employees at National Fabricators, the conduct complained of cannot possibly jeopardize the position of the Union as bargaining agent. In no way could the conduct affect the bargaining process because no bargaining process has ever been attempted. Secondly, the conduct complained of created no visible or continuing obstacle to the future exercise of employee rights. In fact, quite the opposite is true. National Fabricators rehired the seven laid-off employees within three weeks and has continued to employ large numbers of union and non-union members alike. No evidence whatsoever was presented by the Board of any visible and continuing obstacle to the future exercise of employee rights. Thus, the Court of Appeals below has apparently departed from the well-accepted parameters of the category "inherently destructive" and permitted the inclusion of activity which heretofore would have required proof of anti-union animus. No adverse effects have been demonstrated.

2. THE CATEGORY OF "INHERENTLY DESTRUCTIVE" CONDUCT MUST BE RESTRICTED

The opinion below has in effect so expanded the category of "inherently destructive conduct" that the exception has swallowed the rule. Generally, the Act requires and Congress intended that the Board sustain its burden of proof that anti-union animus motivated the conduct of the employer. *Metropolitan Edison Company v. National Relations Labor Board,* 460 U.S. 693, 700, 103 S.Ct. 1467, 1473, 75 L.Ed.2d 387 (1983). The exception to this rule is when the Board finds overwhelming evidence that the employer's conduct was so damaging that a legal inference of improper motive

may be drawn from the conduct itself. Such legal presumptions must be reserved for conduct that directly and unambiguously deters protected activity.

The Court of Appeals below correctly recognized that, in order to fall within the classification of "inherently destructive," the conduct must either create "visible and continuing obstacles to the future exercise of employee rights" or the conduct is such that it "directly and unambiguously penalizes or deters protected activity." *National Labor Relations Board v. Haberman Construction Company,* 641 F.2d 351, 359 (5th Cir. 1981).

The facts in the present case do not support placing the conduct complained of within the category of "inherently destructive." The ALJ found as a matter of fact and upon determination of credibility that National Fabricators was not motivated by anti-union sentiment when the employees in question were temporarily laid off. Appendix C at C-5.

First, this Court should note that the adverse effects suffered by the layoff of these union members were not caused by National Fabricators, but rather by the Union itself. The Union knew and approved of union members working for National Fabricators. Nevertheless, the Union's letter of September 15, 1987 put the local members in the untenable position of deciding between their jobs and the Union. The Board suggests in its opinion that National Fabricators could have waited for a picket line to materialize and then permanently replace those who participated in the strike. National Fabricators took the much less abrasive approach by temporarily laying off only those employees who had expressed their intent to quit anyway, thereby preserving their rights to unemployment compensation.

Secondly, the record is replete with evidence that National Fabricators had a legitimate business reason for laying off employees on October 7, 1987. The Board does not dispute these legiti-

mate reasons, but relies exclusively on the legal presumptions which flow from the classification of the conduct as "inherently destructive." The substantial weight of the evidence does not support the legal inferences which flow from this classification. All seven employees who were laid off were called back to employment within three weeks without any loss of seniority. The layoffs had no direct or lasting effect on protected activity. The prompt reinstatement belies any claims that either the workers who were laid off or future union employees were directly and unambiguously penalized or deterred from engaging in protected activity.

The record in the present case is devoid of any evidence that the temporary layoffs at issue had a lasting effect on the exercise of protected activity. Absent such proof, a finding of "inherently destructive" is not supported by substantial evidence. In *National Labor Relations Board v. Sherwin-Williams Company,* 714 F.2d 1095 (11th Cir. 1983), the court ruled that because there was no evidence in the record to show that the employer's action hindered the future exercise of employee rights, the conduct could not be classified "inherently destructive." Consequently, actual proof of anti-union motivation was required to sustain the unfair labor practice charge. *Id.*, at 1101.

The Court of Appeals below erred when it held that the Board "[n]eed not demonstrate that the labor activity was actually hindered by the illegal employer activity." 903 F.2d at 400. This conclusion is directly contrary to the jurisprudence on the subject. As stated before, in order to fall within the category of "inherently destructive conduct," the activity must directly and unambiguously penalize or deter protected activity. If, in fact, no adverse effects were experienced, how can it be classified as "inherently destructive"? The opinion below is internally inconsistent.

The Court of Appeals also held that an employer may not discriminate against certain employees merely because it anticipates that they will engage in protected activity. This is clearly not the law. In *American Shipbuilding Company v. National Labor Relations Board,* 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed.2d 855 (1965), the Court held that an employer does not violate the Act by instituting a lock-out in *anticipation* of a strike. The Court concluded that an employer may lay off its union member employees to "pre-empt" the possibility of a strike if supported by a legitimate business purpose. *Id.*, 85 S.Ct. at 965.

By categorizing a conduct as "inherently destructive," the court establishes an irrebuttable or conclusive presumption that the employer harbored some improper motive. Such presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments and should be severely restricted. *Vlandis v. Kline,* 412 U.S. 441, 446, 93 S.Ct. 2230, 2233, 37 L.Ed.2d 63 (1973). In that case, the Court determined that the presumption applied was violative of due process where it was not necessarily or universally true in fact.

In the present case, the decision of the Court of Appeals below casts aside the legitimate business reasons offered by National Fabricators as explanations for its conduct. The holding of the court relies upon the conclusive presumptions associated with classifying the conduct as "inherently destructive." National Fabricators submits that applying the legal presumption of improper motive to the facts in this case is wholly unwarranted and may well be violative of its constitutional rights to due process.

If for no other reason, this Court should favorably consider this Petition for Writ of Certiorari to further define and restrict the category of "inherently destructive conduct" as a matter of policy to prevent the unbridled expansion of authority which this deci-

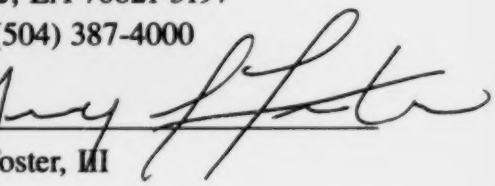
sion, left unchecked, would give to the Board. The general counsel for the Board, like any other plaintiff, must carry its burden of proof. This Court should not permit the extension of a legal presumption which relieves the general counsel of his ultimate burden to cases where the facts are clear that no direct or unambiguous detrimental effects have been experienced. The decision rendered by the Court of Appeals below so broadens the category of "inherently destructive conduct" that the exception has swallowed up the rule.

CONCLUSION

The decision of the United States Court of Appeals, Fifth Circuit, applying the conclusive presumption that anti-union animus is to be inferred by the conduct complained of, was improper. The decision below so broadens the category of "inherently destructive conduct" that it may now include conduct which does *not* directly or unambiguously deter protected activity. The National Labor Relations Act generally requires that the general counsel sustain his burden of proof that disparate treatment has been accorded union members. Only in rare situations where the conduct is so obviously egregious and no other reasonable explanation is possible, may the legal presumptions attaching to the category of "inherently destructive conduct" apply. In order to clarify the law in this area, this Petition for Writ of Certiorari should be granted.

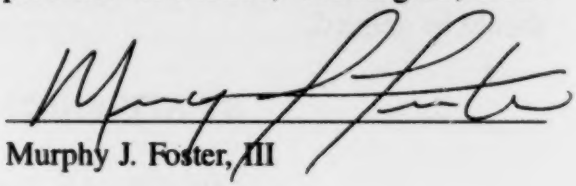
BY ATTORNEYS:

BREAZEALE, SACHSE & WILSON
23rd Floor, One American Place
Post Office Box 3197
Baton Rouge, LA 70821-3197
Telephone: (504) 387-4000

By: 
Murphy J. Foster, III

PROOF OF SERVICE

I, Murphy J. Foster, III, attorney for National Fabricators, Inc., petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that three (3) copies of the above and foregoing Petition for Writ of Certiorari, and its appendices, has been sent this date, United States Mail, postage prepaid and properly addressed, to: The National Labor Relations Board, respondent in connection with this Petition for Writ of Certiorari, through its counsels of record, Mr. Jerry M. Hunter, General Counsel, Mr. Robert E. Allen, Associate Counsel and Ms. Aileen A. Armstrong, Deputy Associate General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570, (202) 254-9076 and one (1) copy to the Solicitor General, Department of Justice, Washington, D.C. 20530.



Murphy J. Foster, III

APPENDICES

APPENDIX A

NATIONAL FABRICATORS, INC.,
Petitioner, Cross-Respondent,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent, Cross-Petitioner.

No. 89-4718.

United States Court of Appeals,
Fifth Circuit.

June 19, 1990.

Before THORNBERRY, GEE, and BARKSDALE, Circuit Judges.

THORNBERRY, Circuit Judge:

This case involves a petition for review and cross-petition for enforcement of an order of the National Labor Relations Board (Board) entered against National Fabricators, Inc. (National Fabricators) after a hearing before an Administrative Law Judge (ALJ). Although this is a close case, we find that the Board's order is reasonable and supported by substantial evidence from the record, and therefore we enforce the order.

Facts and Procedural History

National Fabricators is a nonunion fabricator of pipes. Some of its employees are members of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local 198 (union). On October 7, 1987, National Fabricators was facing a work slowdown

and had legitimate economic reasons for laying off seven employees. The unfair labor practices charged in this case arose out of National Fabricators' selection of union employees for the layoff.

The facts underlying the alleged unfair labor practices are essentially undisputed. In a letter dated December 15, 1986, the union had given its members permission to work for nonunion employers such as National Fabricators. On September 15, 1987, however, the union wrote its local members that its previous letter was erroneous and that the union's constitution prohibited union members from working for nonunion employers. The letter stated that the members had 30 days to quit their nonunion jobs or be subject to internal union discipline, including fines, suspension, and/or expulsion.

Numerous discussions arose among employees and supervisors regarding the letter, including whether the union employees would quit National Fabricators or quit the union. Since the union threatened action within 30 days, it was anticipated that a picket line would be established by October 15, 1987, and there were discussions as to whether union employees would honor the picket line. Oscar LaFleur, part owner and supervisor of National Fabricators, was also a union member. Along with foreman Reid Jury, a fellow union member, LaFleur was in charge of selecting which employees to lay off in response to the imminent work slowdown. The standard practice at National Fabricators was to lay off the least senior employees. But because of the union letter, LaFleur decided to ask the union employees whether they intended to stay at National Fabricators or quit the union.

After consulting his employees, LaFleur decided to lay off seven union members even though there were less senior nonunion employees. LaFleur testified that he laid off the union members because he expected that they were going to quit on October 15 anyway. But the ALJ and the Board found that these employees were laid off because National Fabricators feared that they would honor the expected picket line. National Fabricators concedes that it was motivated to select union employees in part because it feared they would not cross the expected picket line.

In fact, no picket line ever materialized, and three weeks after they were laid off, business improved at National Fabricators and all seven union employees were rehired. Since that time, National Fabricators has hired other union employees as well.

The union filed unfair labor practice charges against National Fabricators arguing that it had illegally laid off the union employees in violation of sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (3).[1] The ALJ agreed and held that the employees' assertions that they would honor a picket line was a protected activity, and that a discharge for that activity violated sections 8(a)(1) and 8(a)(3). Although there was no finding of antiunion animus, the Board affirmed and found that National Fabricators' conduct was inherently destructive of employee rights. It further found that National Fabricators failed to offer legitimate business reasons for laying off those employees who would honor a picket line. National Fabricators brought this appeal.

Discussion

[1] Given the Board's expertise in applying the general provisions of the Act to the complexities of industrial life, our review is narrow. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236, 83 S.Ct. 1139, 1150, 10 L.Ed.2d 308 (1963). In cases where we must review

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[1] Sections 8(a)(1) and 8(a)(3) state in relevant part:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

29 U.S.C. §§ 158(a)(1) and (3). "Although §§ 8(a)(1) and (a)(3) are not coterminous, a violation of § 8(a)(3) constitutes a derivative violation of 8(a)(1)." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n. 4, 103 S.Ct. 1467, 1472 n. 4, 75 L.Ed.2d 387 (1983).

the legal effect of a given set of facts, the Board's determination must be upheld "if reasonable, consistent with the Act, and based on findings supported by substantial evidence." *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1181 (5th Cir.1982); *NLRB v. L.B. Priester & Son, Inc.*, 669 F.2d 355, 359 (5th Cir.1982).

[2] Although there was no finding of antiunion animus, the Board found that National Fabricators' decision to lay off those employees who were expected to honor a picket line was inherently destructive of important employee rights. If an employer's discriminatory conduct is "inherently destructive," it carries with it a strong inference of impermissible motive, and no proof of antiunion animus is required. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34, 87 S.Ct. 1792, 1798, 18 L.Ed.2d 1027 (1967). "In such a situation, even if an employer comes forward with a nondiscriminatory explanation for its actions, the Board 'may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justification and the invasion of employee rights in light of the Act and its policy.' " *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 701, 103 S.Ct. 1467, 1473, 75 L.Ed.2d 387 (1983) (quoting *Great Dane*, 388 U.S. at 33-34, 87 S.Ct. at 1797). On the other hand, if the adverse effect on employee rights is "comparatively slight," and the employer has come forward with legitimate and substantial business justifications, then proof of antiunion animus is required. *Id.*

There are two categories of conduct which have been held to be inherently destructive of important employee rights. One type of such conduct is that which creates "visible and continuing obstacles to the future exercise of employee rights." *NLRB v. Haberman Constr. Co.*, 641 F.2d 351, 359 (5th Cir.1981) (en banc). The second type of inherently destructive conduct is that which "directly and unambiguously penalizes or deters protected activity." *Id.*

In holding that National Fabricators' conduct falls within the second category, the Board found that "the criterion used by [National Fabricators] to select employees for layoff — disfavoring

employees who were likely to engage in protected union activities — is the kind of coercive discrimination that naturally tends to discourage unionization and other concerted activity." To avoid being laid off, union employees were left with little choice but to agree in advance to resist the union's probable appeal to engage in picketing. In fact, resigning from union membership could be perceived as the only alternative to avoid the advance layoff. The Board concluded that "[s]uch direct coercion of employees to abandon contemplated support for union activity would surely pose a lingering hindrance to future organizational activity."

[3] We defer to the Board's conclusion that National Fabricators' conduct adversely affects protected employee rights. Section 8(a)(3) not only proscribes discrimination that affects union membership, it also makes unlawful discrimination against employees who participate in concerted activities protected by section 7 of the Act. *Metropolitan Edison*, 460 U.S. at 703, 103 S.Ct. at 1474. Peaceful picketing and the honoring of a picket line fall within the activities protected by section 7, *e.g.*, *NLRB v. Schwab Foods, Inc.*, 858 F.2d 1285, 1289 (7th Cir.1988); *NLRB v. Southern Greyhound Lines*, 426 F.2d 1299, 1301 (5th Cir.1970), and selecting for layoff those employees who are expected to engage in those protected activities undoubtedly discourages such activity.

[4] Although National Fabricators points out that it may hire permanent replacements for its striking workers, *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345, 58 S.Ct. 904, 910, 82 L.Ed. 1381 (1938), it may not discriminate against certain employees merely because it anticipates that they will honor a picket line or otherwise engage in protected activity. Permitting such conduct would allow an employer to systematically discriminate against all union employees on the grounds that they are more likely to engage in protected activities than nonunion employees. We also reject National Fabricators' argument that its conduct could not be inherently destructive because the seven employees were rehired within three weeks and because additional union employees have since been hired. First, although the layoff only lasted for a short time, this was fortuitous, as the layoff was indefinite and could have

lasted much longer. Second, although National Fabricators has hired more union employees since the layoff, the Board is only required to demonstrate that the employer's conduct adversely affected protected employee rights, *see Metropolitan Edison*, 460 U.S. at 703, 103 S.Ct. at 1474; it need not demonstrate that the labor activity was actually hindered by the illegal employer activity.

[5] Determining that National Fabricators' conduct adversely affected protected employee rights does not end the inquiry. If the employer offers a legitimate explanation for its conduct, the Board must " 'strike the proper balance between the asserted business justifications and the invasion of employee rights.' " *Id.* (quoting *Great Dane*, 388 U.S. at 33-34, 87 S.Ct. at 1797). The Board determined that National Fabricators failed to offer a compelling reason for selecting for economic layoff those employees expected to honor a picket line. If the union established a picket line, and the union employees honored that line, National Fabricators remained free to hire replacements or call back those laid off under a neutral standard. The ALJ found that LaFleur's own testimony revealed the true justification for the layoff: "[I]f you're going to string out for two or three weeks and carry these people on your payroll and invest money in them, if they're going to quit anyhow a week later, why in the hell are you going to put money into them, lay them off." We agree with the Board that this business justification was neither legitimate nor substantial.

Accordingly, we conclude that the Board's finding of a violation of sections 8(a)(1) and (3) is supported by the substantial evidence on the record as a whole and has a reasonable basis. Therefore, the Board's order is ENFORCED.

APPENDIX B

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 15-CA-10433

NATIONAL FABRICATORS, INC.

and

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, LOCAL 198

DECISION AND ORDER

On November 23, 1988, Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief and a request for oral argument.[1] The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[1] The Respondent's request for oral argument is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions for the reasons stated below[2] and to adopt the recommended Order.[3]

The Respondent argues that it acted lawfully when it selected seven employees for a temporary economic layoff on the ground that they were likely to honor a union picket line that might be set up at the Respondent's establishment in the near future. It in effect claims that it may take this action in anticipation of what it could essentially otherwise do under the principles of *NLRB v. Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1938), and of those cases upholding an employer's right to lock out employees. *NLRB v. Brown Food Store*, 380 U.S. 278 (1965); *NLRB v. Teamsters Local 449*, 353 U.S. 87 (1957); *Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987); *Inter-Collegiate Press v. NLRB*, 486 F.2d 837 (8th Cir. 1973). We find no merit in this argument.

As a preliminary matter, we think it clear beyond peradventure that the criterion used by the Respondent to select employees for layoff—disfavoring employees who were likely to engage in protected union activities—is the kind of coercive discrimination that naturally tends to discourage unionization and other concerted activity. See *Gatliff Business Products*, 276 NRLB 543, 558 (1985). ("[M]ass discharges or layoffs of union adherents are particularly destructive of rights of employees [sic] guaranteed to them in Section 7 of the Act, not only because they serve to separate the proponents of unionization from contact wit [sic] their coworkers, but also because they clearly demonstrate to those who remain that the employer can and will control who works for it based on antiunion considerations.") The alleged discriminatees in the present case, in order to save their jobs, were left with little apparent choice but to agree in advance to resist the Union's

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[2] Member Cracraft affirms the findings and conclusions of the administrative law judge for the reasons stated in his decision.

[3] The judge failed to include an expunction clause in the notice. Accordingly, we shall provide a new notice.

probable appeal to engage in the concerted activity at issue; indeed, resigning from union membership might even be perceived as the price for avoiding the advance layoff, because resignation would protect them from the disciplinary measures that a union may take against members who decline to honor a lawful picket line. Such direct coercion of employees to abandon contemplated support for union activity would surely pose a lingering hindrance to future organizational activity.

The Respondent nevertheless asserts, in something of an a fortiori argument, that it may draw on the business reasons sustained in *Mackay* and in the lockout cases to overcome this unlawful discrimination and coercion. See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 703 (1983) (finding that an employer's conduct is inherently destructive does not end the inquiry, but requires the Board to then "strike the proper balance between the asserted business justifications and the invasion of employee rights"). We do not believe that the business justifications upheld in these cases can be so easily transposed to the instant case.

Under *Mackay* an employer may hire temporary or permanent replacements for employees who have actually vacated their jobs temporarily by going on strike. An employer is afforded this right "[b]ecause the employer's interest [in protecting and continuing its business] must be deemed to outweigh the damage to concerted activities caused by permanently replacing strikers." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 232 (1963). Similarly, in *Brown Food Store* and the other cited decisions, the courts have found that in the particular facts of those cases the employers' business reasons for locking out all of their employees (not just those most likely to support the union) and carrying on operations with temporary replacements outweighed any interference with concerted employee activity or discouragement of union membership. In *Brown*, for example, the Court stressed that the lockout and hiring of temporary replacements, although having a remote tendency to discourage union membership, still were reasonably adapted to the effectuation of a legitimate business end — defending the integrity of the multiemployer bargaining association in the face of a whipsaw strike. 380 U.S. at 288.

In contrast, the Respondent here offers no compelling reason why it had to implement its economic layoff by selecting those employees who it feared would honor a possible picket line. Unlike the employers in the lockout cases, the Respondent was not responding to a bargaining impasse, nor attempting to protect an employer bargaining association. Moreover, there is no indication that the continued operation of its business necessitated that it utilize a discriminatory criterion for laying off employees. For had the Union erected the picket line, and the discriminatees honored that line, the employer remained free to hire replacements or call back to work those who had been laid off under a neutral standard. The judge found that the Respondent's own witness candidly stated the real reason for its discriminatory conduct: "[I] f you're going to string out for two or three weeks and carry these people on your payroll and invest money in them, if they're going to quit anyhow a week later, why in the hell are you going to put money into them, lay them off." As a business justification, this was neither legitimate nor substantial.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, National Fabricators, Inc., Baton Rouge, Louisiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

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[4] Cf. *Laclede Gas Co.*, 187 NLRB 243 (1970). (As contract termination date approached, employer lawfully "locked out" certain of its employees although retaining others on the payroll to do work which readied the company for an impending work stoppage; employer did not select employees on the basis of union membership or activity).

Dated, Washington, D.C., July 31, 1989

/s/ James M. Stephens, Chairman

/s/ Mary Miller Cracraft, Member

/s/ Dennis M. Devaney, Member

NATIONAL LABOR RELATIONS
BOARD

APPENDIX C
UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

Case 15-CA-10433

NATIONAL FABRICATORS, INC.

and

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, LOCAL 198

DECISION

Statement of the Case:

J. PARGEN ROBERTSON, Administrative Law Judge: This case was heard by me in Baton Rouge, Louisiana, on July 13, 1988. The complaint which issued on November 25, 1987, based upon a charge which was filed on October 15, 1987, alleges that Respondent violated Section 8(a)(1) and (3) of the Act.[1]

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[1] Respondent in its answer to the complaint admitted all the commerce allegations, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that the Charging Party is and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

The primary issue here is did Respondent lay off seven employees on October 17, 1987, because of their protected activities.

From before December 1986, a number of union members in the Baton Rouge area were unable to find employment with "union" employers. It became common practice for union members to work for "non-union" employers. One of those non-union employers was the Respondent.

Respondent's Superintendent, Oscar LaFleur, testified that both he and his foreman during 1987, Reid Jury, are union members. Additionally several of Respondent employees, including all the alleged discriminatees, are union members.

By letter to its members dated December 15, 1986, the Charging Party (Local 198) agreed that members could work for non-union employers provided the respective members sign an agreement to try and organize the employer.

However, on September 15, 1987, the International Union wrote the members that the Local erred in authorizing non-union employment. The International cited a constitutional provision prohibiting members from working for non-union employers.

That September 15 letter created activity in the Baton Rouge area. Discussions at Respondent's facility among employees, and among employees and supervisors, oftentimes concerned the International's September 15 letter. There were discussions concerning whether the Union employees would honor a union picket line.

Since the International threatened action within 30 days it was anticipated that a picket line could be established on Octboer 15, 1987.

In late September or early October the Union targeted several of the non-union employers and began organizing efforts. One of those targeted employers was Respondent. Local Representative Bobby Bennett contacted some of Respondent's union employees. Even though they were union members, all seven of the alleged discriminatees signed union authorization cards between September 28 and October 2, 1987.

Superintendent Oscar LaFleur admitted hearing that employees were signing union cards. However, LaFleur denied knowing that any of the alleged discriminatees had signed cards. LaFleur admitted knowing that all the alleged discriminatees were union members.

LaFleur testified that the seven alleged discriminatees were not selected for layoff on October 7, 1987, because they signed union authorization cards. In that regard, LaFleur testified that he did not tell any employee that he selected the seven because they signed union cards. However, LaFleur admitted that he laid off the seven because of his fear they may honor a union picket line. For example, LaFleur testified as follows:

> You know, to me . . . let me back this up and rephrase that thing. I think that what really happened is that we was told these boys was going to quit and it helped prompt the layoff because if you're going to string out for two or three weeks and carry these people on your payroll and invest money in them, if they're going to quit anyhow a week later, why in the hell are you going to put money into them, lay them off.

LaFleur illustrated through his entire testimony that he was referring to the likelihood that the alleged discriminatees would refuse to cross a union picket line when he testified that they were going to quit.

Conclusions:

The evidence is in sharp dispute as to whether Respondent told employees that the October 7 layoff was called when Oscar LaFleur learned that the seven alleged discriminatees had signed union authorizations cards.

However, it is not disputed that LaFleur discussed what the employees would do if the Union picketed their job. The evidence shows that LaFleur was either told or could have understood that each the alleged discriminatees may honor a union picket line.

LaFleur admitted that he was upset by the International Union's September 15, 1987, letter.

The evidence in dispute concerns the question of Respondent's alleged knowledge that the seven alleged discriminatees signed union authorization cards.

Alleged discriminatees Carl Henderson and Thomas Temple testified that after the layoff on October 7, LaFleur told them they were laid off because they signed union cards.

LaFleur admitted having a conservation with Henderson and Temple in the presence of employees Claude Craner and David Lohr. LaFleur denied saying the layoff was because the employees signed union cards. According to LaFleur, he was asked if the layoff was because of cards, but he replied that he didn't know who signed the cards and didn't care. LaFleur was corroborated by the testimony of employees Craner and Lohr. Both Craner and Lohr are members of the Union.

Henderson testified that in subsequent conversations 2 days and 2-weeks after the layoff, LaFleur indicated to him that he could return to work if he rescinded his union card.

Discussion:

Henderson and Temple admitted that employees Craner and Lohr were in the vicinity of the October 7 conversation with LaFleur, but both disputed whether David Lohr overheard the conversation.

In view of the entire record, I am unable to credit that Oscar LaFleur threatened that employes were laid off because they signed union cards, or that he promised to rehire David Henderson if Henderson rescinded his card.

The October 7 conversation was a heated conversation. Respondent had announced the layoffs that day and Oscar LaFleur admittedly was angry because of the International's September 15, letter. It is apparent that all five participants in that conversation may have difficulty recalling who said what. However, the two

employees that had no reason to be angry supported the testimony of Oscar LaFleur. Moreover, those two — Craner and Lohr — were also union members.

Additionally, the overall record illustrates that Oscar LaFleur, a long-term union member, was not concerned with the alleged discriminatees' union membership. Indeed, LaFleur knew of each of the alleged discriminatees' union affiliation from before their employment by Respondent.

Conclusion:

(1). The Section 8(a)(1) Statements:

In view of my credibility findings I cannot credit the evidence regarding the alleged Section 8(a)(1) statements. I find that Respondent did not violate Section 8(a)(1) by telling employees that they had been laid off because employees had signed union cards or by telling an employee he would be reinstated if he returned his union card to the Union.

(2). The Layoff:

In view of my findings above I find that Respondent did not layoff employees on October 7 because its employees signed union authorization cards.

However, due to the admission of Respondent's Superintendent Oscar LaFleur, I find that the employees were laid off because Respondent feared they would honor a picket line.

"It is well established that non-striking employees who refuse to cross a picket line their fellow employees maintain, make common cause with the strikers, and may not be lawfully discharged for their activities." *Dave Castellino & Sons*, 277 NLRB 453, 454 (1985). See also *Ashtabula Forge*, 269 NLRB 774 (1984); *Browning-Ferris Industries*, 259 NLRB 60 (1981) enfd. 700 F.2d 385 (C.A. 7, 1983) *Inland Steel Company*, 264 NLRB 84 (1982).

Picket activity and assertions by employees that they may honor a picket line constitutes protected activity. Therefore, discharge for that activity violates Section 8(a)(1). In the instant case, it is clear

that the threatened picketing also constitutes union activity. Therefore, Respondent's actions in discharging the seven alleged discriminatees also violates Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. National Fabricators, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local 198, is a labor organization within the meaning of Section 2(5) of the Act.

3. By laying off employees Jeffery L. Ashford, Dempsey J. Carlene, Carl W. Henderson, Morris, G. Levine, Jr., Bobby W. Sevario, Michael K. Sevario, and Thomas E. Temple, Jr., because Respondent feared they may honor a union picket line, Respondent violated Section 8(a)(1) and (3) of the Act.

4. Respondent did not otherwise engage in conduct violative of Section 8(a)(1) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall order it to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent has illegally laid off employees, Jeffery L. Ashford, Dempsey J. Carlene, Carl W. Henderson, Morris G. Levine, Jr., Bobby W. Sevario, Michael K. Sevario, and Thomas E. Temple, Jr., I recommend that Respondent be ordered to make Ashford, Carlene, Henderson, Levine, B. Sevario, M. Sevario, and Temple whole for loss of earnings each suffered because of Respondent's illegal activities.[2] Backpay shall [be] computed in

[2] Record evidence indicated that Respondent had rehired all the alleged discriminatees before the hearing in this matter. For that reason I have not recommend a reinstatement order.

the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB. No. 181 (May 28, 1987).[3]

ORDER[4]

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is hereby ordered that Respondent, National Fabricators, Inc., it officers, agents and assigned shall:

1. Cease and desist from:

(a) Laying off its employees because of its fear that those employees may honor a union picket line.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is deemed to be necessary to effectuate the policies of the Act.

(a) Make whole employees Jeffery L. Ashford, Dempsey J. Carlene, Morris G. Levine, Jr., Bobby W. Sevario, Michael K. Sevario, Carl W. Henderson, and Thomas E. Temple, Jr., for losses suffered as a result the discrimination against them in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Expunge from the personnel files of employees Jeffery L. Ashford, Dempsey J. Carlene, Morris G. Levine, Jr., Bobby W. Sevario, Michael K. Sevario, Carl W. Henderson, and Thomas E. Temple, Jr., any reference to its illegal actions against them, and

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[3] Under *New Horizons*, interest is computed at the "short-term Federal rate for the underpayment of taxes as set out in the 1987 amendment to 26 U.S.C. Sec. 6621. Interest accrued before January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Seciton 102.48 of the Rules be adopted by the Board and all objections to them shall be deem waived for all purposes.

notify Ashford, Levine, Carlene, Bobby Sevario, Michael Sevario, Henderson, and Temple, in writing that this has not been done and that evidence of its unlawful actions will not be used as a basis for future personnel action against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timcards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Baton Rouge, Louisiana, facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director, for Region 15, after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated at Washington, D.C., November 23, 1988.

/s/ J. Pargen Robertson
Administrative Law Judge

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[5] If this Order is enforced by a Judgment of the United Courts of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

No. 90-472

In the Supreme Court of the United States

OCTOBER TERM, 1990

NATIONAL FABRICATORS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

LAURENCE S. ZAKSON
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act by selecting seven employees for layoff because it believed they would honor an anticipated union picket line at petitioner's plant.

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 903 F.2d 396. The Board's decision and order (Pet. App. B1-B5, C1-C8) are reported at 295 N.L.R.B. No. 126.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on June 19, 1990. The petition for a writ of certiorari was filed on September 14, 1990. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a nonunion fabricator of pipes. Some of petitioner's employees were members of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local 198 (Union). Pet. App. C1-C2.

On December 15, 1986, the Union sent a letter to its members permitting them to work for nonunion employers provided they signed an undertaking to help organize those employers. On September 15, 1987, however, the Union's International sent the members a letter stating that the December 1986 authorization of employment by nonunion employers was in error; the Union's constitution prohibited such employment. The letter stated that members had 30 days in which to surrender such employment or face exposure to union discipline. Pet. App. A2, C2.

In view of the International's threatened action within 30 days, petitioner's employees and supervisors anticipated that the Union would begin to picket petitioner's plant by October 15, 1987; this possibility occasioned discussions concerning whether the Union employees would honor a Union picket line. In late September or early October 1987, the Union in fact determined that petitioner would be targeted as an employer subject to an organizing campaign. As part of that effort, seven of petitioner's employees, who were already Union members, signed Union authorization cards between September 28 and October 2, 1987. Pet. App. A2, C2.

On October 7, 1987, petitioner faced a downturn in work and laid off some of its work force for economic

reasons. Pet. App. A1-A2, C3.[1] Petitioner's co-owner, Oscar LaFleur, selected for layoff the seven Union members who had signed authorization cards, even though there were less senior nonunion employees. LaFleur explained that the Union employees were chosen because of the fear that they would honor the anticipated Union picket line. Pet. App. A5, B2, C3.

No picketing took place at petitioner's premises on or after October 15. Within three weeks after the layoff, all seven employees had been recalled to work. Pet. App. A3, A6 & n.2.

2. Upon charges filed by the Union, the Board, affirming the administrative law judge's ruling, found that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1),[2] by "select-[ing] seven employees for a temporary economic layoff on the ground that they were likely to honor a union picket line that might be set up at [petitioner's] establishment in the near future." Pet. App. B2. Applying principles articulated in *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 703 (1983), the Board concluded that the selection of the seven employees

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[1] The initial reference to the layoff date as October 17 in the ALJ's decision (Pet. App. C2) is a typographical error. See Tr. 244-245.

[2] Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title". As this Court has noted, "a violation of § 8(a)(3) constitutes a derivative violation of § 8(a)(1)." *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 698 n.4 (1983).

on that ground was inherently destructive of their statutory rights, and that petitioner had "offer[ed] no compelling reason" for its utilization of this "discriminatory criterion." Pet. App. B4.

The Board explained that selecting employees for layoff based on their propensity to honor a picket line "is the kind of coercive discrimination that naturally tends to discourage unionization and other concerted activity" because it leaves employees who wish to safeguard their jobs with little choice "but to agree in advance to resist the Union's probable appeal to engage" in concerted activity. Pet. App. B2-B3. The Board added that "[s]uch direct coercion of employees to abandon contemplated support for union activity would surely pose a lingering hindrance to future organizational activity." Pet. App. B3.

The Board then turned to petitioner's asserted business justification for its invasion of employee rights, and found that it was "neither legitimate nor substantial." Pet. App. B4. The Board found no evidence that "the continued operation of [petitioner's] business necessitated that it utilize a discriminatory criterion for laying off employees." *Ibid.* Rather, the Board noted, if the discriminatees had honored a picket line, "the employer remained free to hire replacements or call back to work those who had been laid off under a neutral standard." *Ibid.*[3]

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[3] The Board rejected petitioner's effort to transpose the policy justifications underlying *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938) (an employer may hire temporary or permanent replacements for striking workers), to the situation here involving an employer's discriminatory layoff of employees believed likely to honor a future picket line. Likewise, the Board rejected petitioner's reliance on *NLRB* v. *Brown Food Store*, 380 U.S. 278 (1965), which upheld an employer's right to lock out employees in advance of a strike

3. The court of appeals enforced the Board's order, concluding that the Board's decision was "reasonable and supported by substantial evidence from the record." Pet. App. A1. The court noted that, "[i]f an employer's discriminatory conduct is 'inherently destructive' " of important employee rights, "it carries with it a strong inference of impermissible motive, and no proof of antiunion animus is required." *Id.* at A4, citing *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). The court accepted the Board's conclusion that petitioner's "decision to lay off those employees who were expected to honor a picket line was inherently destructive of important employee rights." *Ibid.* It stated that "[p]eaceful picketing and honoring of a picket line fall within the activities protected by section 7 and selecting for layoff those employees who are expected to engage in those protected activities undoubtedly discourages such activity." *Id.* at A5 (citations omitted). The court agreed with the Board that, "[t]o avoid being laid off, union employees were left with little choice but to agree in advance to resist the union's probable appeal to engage in picketing," and that "[s]uch direct coercion of employees to abandon contemplated support for union activity would surely pose a lingering hindrance to future organizational activity." *Ibid.*

The court rejected petitioner's contention that its conduct was not "inherently destructive because the

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and to carry on operations with temporary replacements. The Board noted that the lockout in that case affected all of the employees, "not just those most likely to support the union," and that the employer there had the legitimate business objective of "defending the integrity of the multiemployer bargaining association in the face of a whipsaw strike." Pet. App. B3.

seven employees were rehired within three weeks," noting that the "short" duration of the layoff was "fortuitous, as the layoff was indefinite and could have lasted much longer." Pet. App. A5-A6. The court also dismissed petitioner's argument that its conduct could not have been destructive of employee rights because it has, since the layoff, hired additional union employees. Citing *Metropolitan Edison*, 460 U.S. at 703, the court stated that the crucial inquiry is whether "the employer's conduct adversely affected protected employee rights," not whether "labor activity was actually hindered." *Id.* at A6. Finally, the court agreed with the Board that petitioner had failed to offer a legitimate and substantial business justification for selecting for economic layoff those employees expected to honor a picket line. *Ibid.*

ARGUMENT

The decision of the court of appeals correctly applies settled principles to the particular facts, and does not conflict with any decision of this Court or of any other court of appeals. Further review therefore is not warranted.

1. In *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693 (1983), this Court explained the basic principles governing proof of an employer's antiunion motivation in a charge of unlawful discrimination under Section 8(a)(3). When an employer's discriminatory action is "inherently destructive of employee interests" protected by the Act, there is no need for direct evidence of antiunion animus to prove the unlawful nature of the employer's action; the conduct itself "carries with it a strong inference of impermissible motive." *Id.* at 701, quoting *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967). Given such conduct, "even if an employer comes forward

with a nondiscriminatory explanation for its actions, the Board 'may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'" *Ibid.*[4]

Petitioner does not dispute these principles. Rather, espousing a version of the facts rejected by the Board and the court of appeals, petitioner asserts that its conduct was not "inherently destructive" of employee rights protected by the Act because it simply chose for layoff "those men who already expressed their intent to quit their jobs." Pet. 3, 7.[5]

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[4] Alternatively, if the Board concludes that the discriminatory conduct has only a "comparatively slight" impact on protected rights, a different analysis applies. In that situation, when the employer comes forward with a legitimate and substantial business justification for its conduct, an "anti-union motivation must be proved" in order to find an unfair labor practice. *Metropolitan Edison*, 460 U.S. at 701; *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. at 34. Although petitioner apparently contends that it would prevail under this category of analysis (Pet. 4), the record does not support that claim. See p. 10, n.9, *infra*.

[5] Petitioner suggests (Pet. 4) that the Board did not conclude that petitioner's conduct was "inherently destructive," and that the court of appeals drew that conclusion "*for the first time.*" Pet. 2-3 (emphasis in original). That is incorrect. Not only did the Board describe petitioner's conduct as "coercive discrimination that naturally tends to discourage unionization and other concerted activity," it expressly cited *Metropolitan Edison* for the proposition that "finding that an employer's conduct is inherently destructive does not end the inquiry, but requires the Board to then 'strike the proper balance between the asserted business justifications and the invasion of employee rights.'" Pet. App. B2-B3. The Board's application of that aspect of the *Metropolitan Edison* formula-

According to petitioner, it was merely avoiding the inconvenience and inequity of laying off employees who intended to remain with it, rather than laying off those who planned to quit in a matter of weeks. But the Board, upheld by the court below, found that petitioner selected the seven discriminatees because of its fear that they would honor the anticipated union picket line, not because they were expected to quit their jobs.[6] That crucial finding underpins the Board's determination that petitioner's conduct was "inherently destructive." Pet. App. A4, B2-B3.

There is a significant difference between petitioner's proffered justification and the credited facts. While employees have no statutory right to work for an employer until they choose to quit their jobs, they do have a protected right to engage in concerted activity to attempt to unionize their employer. Petitioner directly penalized that right by selecting for layoff those Union employees expected to honor the Union's picket line. Accordingly, contrary to petitioner's contention (Pet. 7), the credited facts of this case amply support the court of appeals' conclusion, in upholding the Board, that petitioner's conduct "'directly and unambiguously penalizes or deters protected activity,'" Pet. App. A4, quoting *NLRB* v. *Haberman Construction Co.*, 641 F.2d 351, 359 (5th Cir. 1981).

Discrimination among employees based on whether they have participated in protected activity is inher-

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tion makes clear that the Board viewed petitioner's conduct to be "inherently destructive."

[6] Indeed, the ALJ specifically stated that "LaFleur illustrated through his entire testimony that he was referring to the likelihood that the alleged discriminatees would refuse to cross a picket line when he testified that they were going to quit." Pet. App. C8.

ently destructive of protected rights. *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 231 (1963). Discrimination based on the employer's belief that the penalized employees *will* participate in protected activity is equally destructive of protected rights. *Commercial Contracting Co.*, 283 N.L.R.B. 784 (1987). Nor does the fact that petitioner called back the laid off employees within three weeks without any loss of seniority and subsequently hired union members (Pet. 4, 8) negate the chilling effect of its action on the willingness of employees to honor a union sponsored picket line in the future.[7] As the Board found, petitioner's decision to make layoff decisions on the basis of the employees' willingness to engage in protected activity "would surely pose a lingering hindrance to future organizational activity." Pet. App. B3. The finding that petitioner's discriminatory conduct is "inherently destructive" is a determination "entrusted * * * in the first instance to the Board," *Metropolitan Edison*, 460 U.S. at 702, and is entitled to "considerable deference." *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990).

Contrary to petitioner's contention (Pet. 8), the court of appeals was correct in stating that the Board "need not demonstrate that the labor activity was actually hindered by the illegal employer activity." Pet. App. A6.[8] In *Metropolitan Edison*, the Court did not

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[7] Although recalled, the seven employees nonetheless lost three weeks of work and pay because of their perceived willingness to engage in protected activity. See Pet. App. C6 (backpay order).

[8] Petitioner misses the mark in asserting that *NLRB* v. *Sherwin-Williams Co.*, 714 F.2d 1095 (11th Cir. 1983), indicates that "a lasting effect on the exercise of protected activity" is required to classify a discriminatory practice as "inherently destructive." Pet. 8. In *Sherwin-Williams*, the court

require a showing that any employees had refused to serve as union officials before deferring to the Board's conclusion that the imposition of more severe discipline on striking union officials than on rank-and-file employees "adversely affects protected employee interests." 460 U.S. at 703. Here also, the Board was not required to demonstrate that petitioner's conduct had actually caused employees to refuse to participate in protected activity before finding such conduct inherently destructive of that right; instead, it could base that finding on a reasonable inference.[9]

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found that although an employer had an established practice of discontinuing disability benefits during work stoppages, the record did not show that "in the past this practice hindered future bargaining or created continuing obstacles," or that it had deterred the particular strike at issue. 714 F.2d at 1101. Here, by contrast, the record did not reveal a past practice by petitioner of choosing employees for layoff on any basis other than seniority. Pet. App. A2.

[9] Even if petitioner were correct in its assertion that its conduct was not "inherently destructive" of protected employee rights, but had only a "comparatively slight" effect on those rights (Pet. i), the Board's unfair labor practice finding would still be entitled to affirmance. As the Court explained in *Metropolitan Edison*, "if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct." 460 U.S. at 701, quoting *Great Dane*, 388 U.S. at 34 (emphasis in original). The Board and the court of appeals reasonably concluded that petitioner did not show "a legitimate and substantial" business justification for its conduct. Petitioner simply had no need to discriminate against employees expected to participate in a strike in order to protect its business interests, because it would be entitled to replace them with laid off employees or new hires should the expected picket line materialize and the seven employees honor it. Pet. App. A6, B4. In that setting, proof of anti-

3. Citing *Esmark, Inc.* v. *NLRB*, 887 F.2d 739 (7th Cir. 1989), petitioner suggests that conduct can be inherently destructive only if it interferes with an ongoing bargaining relationship. Pet. 5-6. That suggestion, however, is incorrect and draws no support from *Esmark* itself. In that case, in which there was an established collective bargaining relationship, the issue was whether the employer's conduct deterred the process of collective bargaining or just put pressure on employees to accept a particular substantive proposal. 887 F.2d at 748. But the court noted that

> [t]wo types of acts are considered "inherently destructive." First are actions which distinguish among workers based on their participation (or lack of participation) in a particular concerted action (such as a strike). On the other hand, conduct may be inherently destructive even though it does not divide the work force into antagonistic factions, but instead "discourages collective bargaining in the sense of making it seem a futile exercise in the eyes of employees."

Id. at 748-749 (footnotes omitted). The former type of action is involved here; the latter was involved in *Esmark*.

Petitioner's reliance (Pet. 9) on *American Ship Building Co.* v. *NLRB*, 380 U.S. 300 (1965), is similarly misplaced. There, the employer locked out all of its unit employees in order to pressure them to accept the employer's bargaining proposals after the parties had bargained to impasse; no discrimination

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union animus was not required in order to find an unfair labor practice. See *Great Dane*, 388 U.S. at 34 (finding it "not necessary" to determine whether the employer's conduct was "inherently destructive" of employee rights, rather than having a "comparatively slight" effect on them, because "the company came forward with no evidence of legitimate motives for its discriminatory conduct").

against union members was involved. 380 U.S. at 308, 312. Here, by contrast, petitioner engaged in the *discriminatory* practice of subjecting to economic disadvantage only those of its employees whom it believed likely to engage in protected activity—honoring a picket line. The vice in petitioner's conduct inheres precisely in the discrimination among employees based on their anticipated willingness to engage in protected activity. See *Erie Resistor, supra*, 373 U.S. at 230-231. *American Ship* did not involve that practice. See *American Ship*, 380 U.S. at 312 ("There is no claim that the employer locked out only union members, or locked out any employee simply because he was a union member.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

LAURENCE S. ZAKSON
Attorney

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